FILE COPY

OFFICE
SUPREME COURT, U.S.
JAMES

IN THE

Supreme Court of the United States

October Term, 1958

No. 422

PERFECT BRASSIERE CO., INC.,
Petitioner,

against

PERFECTFORM CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

S. STEPHEN BAKER,
Counsel for Respondent,
No. 250 West 57th Street,
New York 19, N. Y.
JUdson 6-7339

IN THE

Supreme Court of the United States

October Term, 1958

No. 422

PERFECT BRASSIERE CO., INC.,

Petitioner,

against

PERFECTFORM CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

In its statement, the petitioner has managed to avoid apprising this Court that it deliberately copied and made a substantial replica of the respondent's prestige trademark.

The petitioner actually copied the respondent's trademark to the point where the respective marks were hardly distinguishable. It applied the pirated trademark to its own cheap brassieres selling as low as 69¢. The respondent's trademark represented expensive lingerie sold in better department stores and better shops.

The petitioner's motives were obvious. It vested its cheap goods with a name that meant prestige to the public. After it pirated respondent's trademark its sales almost tripled. Correspondingly, the respondent's sales plummeted downwardly.

The above stated facts are beyond dispute. The opinion below outlines these facts very carefully.

Significantly enough, at the trial, the petitioner contended that the remarkable resemblance between the respective marks was a coincidence (R. 92a). Such a contention was little less than absurd. It is best answered by referring to the opinion of the Third Circuit Court of Appeals in this case. Specifically, at the bottom of page 27 of the Petition herein, appears the relevant portion of the opinion below as follows:

> "That the use by defendant of practically a replica of plaintiff's trade-mark was deliberate is conclusive from the facts * * *"

The opinion then details the facts supporting this statement.

The decision of the Third Circuit favored the respondent in its second cause of action, the one for unfair competition. This second cause of action (R. 5a) is simply the conventional, common-law action for unfair competition. The Lanham Act has nothing to do with it.

The petitioner contends (Conclusion, p. 15 of petition) that this case poses far reaching and difficult questions of law. We fail to see anything far-reaching or difficult in an obvious case of piracy. Certainly, a manufacturer may not deliberately copy another's trademark and apply it to goods which are closely and obviously related as are brassieres and slips.

The petitioner has contended that federal law applied to this unfair competition count. However, the Third Circuit concluded (see p. 22 of petition) that this point is non-decisional. The Court determined that under the facts of this case, there exists unfair competition whether it were to apply federal law or state law. We submit that this conclusion is unavoidable. Further, the petitioner has not shown the slightest conflict in the circuits. No circuit would hold the petitioner's acts justifiable.

Since, in its petition, the petitioner omitted to state that it deliberately copied the complete trademark of the respondent including the details of its appearance, the petitioner is able to pose questions of law as if this case involves such questions. On the contrary, this case involves simple questions of fact such as have been presented by common-law unfair competition actions back to antiquity.

We do not doubt that the Lanham Act is "complex and controversial" (Petition, p. 14). However, it has nothing to do with the issues here presented. Were this Court to decide the questions posed by the petitioner, we respectfully submit that it would be deciding academic and moot points.

Conclusion

The petitioner is attempting to portray this action as presenting complex and conflicting issues of law. There is nothing complex or conflicting about deliberate piracy. This action involves nothing but a simple and indisputable fact situation which, when candidly stated, points inevitably to the conclusions to be reached. We doubt that this Court will grant certiorari in the face of such obvious unfair competition.

Dated: New York, December 1, 1958.

Respectfully submitted,

S. Stephen Baker,
Counsel for Respondent.